

<b>James v City of New York</b>
2021 NY Slip Op 32132(U)
November 4, 2021
Supreme Court, New York County
Docket Number: Index No. 153991/2021
Judge: J. Machelie Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

*Justice*

-----X

RODNEY JAMES,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT  
OF EDUCATION, NEW YORK CITY BOARD OF  
EDUCATION, GUARDIAN BUS COMPANY, INC., JEAN  
DEGRAFF

Defendant.

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INDEX NO. 153991/2021

MOTION DATE 08/13/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff RODNEY AARON JAMES, JR. in an incident that occurred on September 25, 2020, at or about 4:13 pm, on Lawson Boulevard near its intersection with Daly Boulevard, in the County of Nassau and State of New York, when he was operating a vehicle that was struck by a vehicle operated by JEAN DEGRAFF with License Plate Number 11559BT.

Pending before the court is a motion filed by defendants CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and NEW YORK CITY BOARD OF EDUCATION (collectively, the "City") seeking an order, pursuant to CPLR § 3212, granting summary judgment to defendant City, and dismissing plaintiff's Complaint and any cross-claims against the City, on the basis that the City is not a proper party in this matter. Upon the foregoing documents, this motion is GRANTED.

### Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1<sup>st</sup> Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues

of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

#### City’s Prima Facie Case

In the motion, the City argues that the vehicle that allegedly struck plaintiff’s vehicle was owned and operated by co-defendants JEAN DEGRAFF and GUARDIAN BUS COMPANY, WC. (collectively, the “Bus Company”), a separate and distinct legal entity from the City. The City argues that they did not own, operate, maintain, manage, or control the vehicle in question with Plate Number 11559BT, and hence the City may not be held liable for plaintiff’s alleged injuries. In support of their motion, the City produced a copy of the certified Abstract of Registration Record from the New York State Department of Motor Vehicles for License Plate 11559BT (NYSCEF Document #23). The City argues that this document establishes that the City was not the record owner of the vehicle at the time of Plaintiffs alleged accident, and in fact, the registered owner was co-defendant Bus Company.

Here, it is undisputed that the motor vehicle that struck plaintiff's vehicle bore New York State License Plate Number 11559BT and it is clear from the Abstract of Registration Record that the owner of the vehicle bearing such license plate is Guardian Bus Company, Inc. Further, as the City properly argues, the Bus Company admitted in their Answer (NYSCEF Document #22) that defendant JEAN DEGRAFF was the operator of the subject vehicle at the time of the alleged incident and was acting within the scope of his employment with defendant GUARDIAN BUS COMPANY, INC.

Given this, the court finds that the City has made a *prima facie* showing supporting summary judgment, and the burden now shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

### Opposition

Notably, the Bus Company filed no opposition. In fact, the only opposition was filed by plaintiff, who argues that the City's motion is not supported by evidence in admissible form, and that the City's motion is premature.

Specifically, plaintiff argues that the City was "silent on the issue of whether moving Defendants managed, maintained, or controlled the subject vehicle at the time of the incident," and "the only 'evidence' to support a lack of management, maintenance, or control is the Defendants' Attorney's Affirmation," as opposed to someone with personal knowledge.

Plaintiff also argues that he had served a "Notice to Produce" seeking any and all contracts/leases related to the subject bus, and the City failed to respond. Plaintiff argues that he should not be foreclosed from exploring whether such leases and/or contracts exist, and the court

should not deprive plaintiff of the opportunity to explore the nature and extent of the City's control over the subject bus.

In reply, the City submitted a sworn Affidavit by Latia Riley, (NYSCEF Document #34), that states that she is a Fleet Analyst for the New York City Department of Citywide Administrative Services, and that she conducted a search of City records of vehicles that the City owned and leased on September 25, 2020. Per Ms. Riley, "The search revealed that the City did not own, lease, operate, manage, maintain, or control any motor vehicle bearing New York Registration Number 11559BT in the County, City and State of New York on September 25, 2020."

With respect to whether the City managed, maintained or controlled the offending vehicle, the court finds plaintiff's arguments to be unavailing. Contrary to plaintiff's claim, the City did not reply only on its Attorney Affirmation, but the City also submitted both a certified copy of the Abstract of Registration Record, as well as the sworn Affidavit from Ms. Riley. Collectively, these documents sufficiently establish that the City did not own, lease, operate, manage, maintain, or control any motor vehicle bearing New York Registration Number 11559BT in the County, City and State of New York on September 25, 2020. And, importantly and as noted above, the Bus Company did not oppose this motion.

With respect to whether this motion is premature, the court notes that plaintiff's Notice to Produce (NYSCEF Document #31) was dated September 23, 2021, more than one month after the City filed the instant motion on August 14, 2021. Although plaintiff argues that the issue of control over the subject bus is still in dispute and that further discovery could provide pertinent evidence, the court finds that these arguments are based purely on speculation. As the City correctly argues, "No amount of discovery could be exchanged that would warrant a denial of the City's motion or

reveal that the City is liable for plaintiff's injuries because the City has established through sufficient evidence that it does not own, lease, operate, manage, maintain, or control the bus with registration number 11559BT." Finally, this court notes that plaintiff has not submitted any evidence to support its theory that the City may, somehow, own, manage, maintain, operate, or control the vehicle which struck plaintiff's vehicle.

Accordingly, this court finds that plaintiff has failed to meet his burden to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action.


Given the above, it is hereby:

**ORDERED** that the City's motion is GRANTED; and it is further hereby

**ORDERED** that the Complaint and any cross-claims are dismissed as against the City; and it is further hereby

**ORDERED** that the caption is amended so as to remove the CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, and NEW YORK CITY BOARD OF EDUCATION as named defendants; and it is further hereby

**ORDERED** that this action is transferred to a non-City part.

<u>11/4/2021</u> DATE		 J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE